No. 11707

In The United States Court of Appeals
For the Ninth Circuit

CONTINENTAL CASUALTY COMPANY,
a corporation,
Defendant and Appellant,
vs.
THE UNITED STATES OF AMERICA,
for the use of M. C. SCHAEFER,
an individual doing business as
CONCRETE CONSTRUCTION COMPANY,
Plaintiff and Appellee,

A. C. GOERIG and CLYDE PHILP,
individuals and co-partners,
Defendants and Cross Appellants,

SAM MACRI, DON MACRI and JOE MACRI,
individuals and co-partners,
Defendants and Cross Appellants.

UPON APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

PETITION OF CROSS APPELLANTS MACRI FOR REHEARING

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THE ARGUS PRESS, SEATTLE

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CERTIFICATE

THIS CERTIFIES that the within petition of cross appellants Macri for rehearing is, in the judgment of the undersigned, who is one of counsel for the cross appellants Macri, well founded, and that it is not interposed for delay.

Tom W. Holman

(Tom W. Holman)

PETITION OF CROSS APPELLANTS MACRI FOR REHEARING

The cross appellants Sam Macri, Don Macri and Joe Macri hereby petition the above-entitled court for a rehearing herein.

It is respectfully submitted that between time of argument before this court on October 19, 1948, and time of filing opinion, February 11, 1949, the Honorable Judges of this court have been unintentionally drawn away from the issues as they were presented. The following statement from the filed opinion shows a decided warping:

> "The Macris rely on *City and County of San Francisco v. Transbay Construction Co.*, 134 F. (2d) 468 (Cir. 9). * * *"

The fact is that His Honor Judge Healy, near the end of concluding argument by Mr. Holman, for the Macris, asked, in substance, what is to be said about the applicability of the above-mentioned case; that Mr. Holman stated frankly he was unfamiliar with that case, and that none of the parties litigant had cited it in their briefs or in argument to the court; that thereupon His Honor Judge Denman suggested that Mr. Holman read that case and write the court after doing so. That not only was done by Mr. Holman, but all parties litigant wrote the court specifically about that case.

It is, therefore, manifestly unfair to have the filed opinion so state the Macris' position. That statement is not supported by the briefs or by oral argument. In fact, our position is definitely based on *United States v. Wyckoff Pipe & C. Co.*, 271 U.S. 263, 46 Sup. Ct. 503, 70 L. ed. 938, as cited and discussed in the Macris' opening brief, pp. 49-51, 52, App. III,

reply brief pp. 5, 12. The court, notwithstanding this, has not even mentioned that prime case, nor has the court cited and discussed any Washington authorities contrary to the holding of the above *Wyckoff* case.

Further, the filed opinion should not be allowed to stand as presently written for the reason that the same contains a substantial miscalculation in determining the amount of the judgment. The filed opinion holds "* * * the Macris liable for the extra work performed at their request." (filed opinion p. 6)

Elsewhere the filed opinion states, "Schaefer should be allowed to recover in excess of the stipulated contract price for work performed in reliance on Macris' statements * * *." (filed opinion p. 5) The evidence available to the court for the determination of the amount to be allowed for this "extra work" is a statement of costs prepared on behalf of Schaefer by a certified public accountant, which showed all of Schaefer's costs on the project and the estimates of witnesses for Schaefer that his performance, had it progressed as originally contemplated, would have cost substantially the same as the amount of Schaefer's subcontract bid price. The amount of the extra compensation was determined by allowing Schaefer therefor the difference between his total cost, including twenty per cent (20%) cost and ten per cent (10%) profit, and the subcontract bid price.

This is error, for the total cost figure included twenty per cent (20%) overhead on all direct costs and ten per cent (10%) profit on all direct costs plus overhead. Schaefer is not, under the filed opinion, entitled to twenty per cent (20%) profit and ten per

cent (10%) overhead on the subcontract price, for such amounts were presumably included by Schaefer in arriving at the amount of his bid, and furthermore, would not have been recoverable in any event had the contract been performed "as originally contemplated." In this latter event Schaefer would have been strictly limited to his bid price. If this honorable court is willing to accept this type of evidence in proof of the amount of the claimed extra work, notwithstanding the authorities cited by the Macris (Macris' opening brief pp. 54, 55), and notwithstanding that it was Schaefer's duty to keep an account of the costs of such extra work, the proper method then for such computation, based upon Schaefer's own statement of costs, is as follows:

(a)	Schaefer's total direct costs allowed by the Court (Schaefer op. br. p. 62)		$67,712.84
(b)	Subcontract price (Schaefer op. br. 70)		35,274.12
(c)	Total direct cost of extra work		32,438.72
(d)	Overhead on extra work—20% of (c)		6,487.74
(e)	Total cost of extra work—(c) plus (d)		38,926.46
(f)	Ten per cent profit on extra work		3,892.65
(g)	Total cost, overhead and profit on extra work		42,819.11
(h)	Amount remaining unpaid on subcontract price:		
	Subcontract price	$35,274.12	
	Amount paid by Macris	32,614.66	2,659.46
(i)	Total amount *properly* due Schaefer under the filed opinion of the Court		45,478.57

The judgment of the trial court should be reduced

to this figure in any event on Schaefer's own figures and without question.

Alluding to the briefs of these appellants and of the appellant Continental Casualty Company and the petition of the latter for rehearing, there can be no question but that the judgment entered by the trial court is a judgment for damages and breach of contract. For this reason it is again submitted that there should be no profit item allowed on the "extra work," more accurately denominated under the authorities "damages" for breach of contract. Damages are compensatory. Schaefer's profit on this job was properly contained in his subcontract bid price. The situation is not changed by saying that his performance was continued in reliance upon statements by Macris, for there was no difference between such statements and the implied obligation existing in every contract to pay damages occasioned by the breach thereof. There should be no arbitrary profit item allowed on the extra work. This fact apparently escaped the consideration of the trial court because of its allowance of recovery for the entire performance on a *quantum meruit* basis rather than limiting such recovery to the extra work only.

The opinion filed by the court holds that the law of the State of Washington is applicable. It is submitted that the court should reconsider, by rehearing herein, the adequacy of Schaefer's proof of the amount of the increased cost of his performance. In this portion of the filed opinion the court states: "There

was evidence to show what Schaefer's costs would have been if the work had progressed as originally contemplated. * * * In the light of this evidence we cannot say that the finding of the trial court was erroneous." Upon this basis the judgment in favor of Schaefer against Macris is affirmed in the filed opinion. There is not a single case cited in support of this conclusion, and it is submitted the evidence is not sufficient under Washington cases.

It will be recalled that Schaefer accepted, without protest or dispute, regular payments as the work progressed, as it was provided in the contract he was to receive. There was no statement of so-called extra costs rendered or payment demanded.

In the case of *Ross v. Raymer*, 132 Wash, Dec. 131, 201 P.(2) 129, decided December 17, 1948, the Washington Supreme Court quotes from a prior decision, *Ammerman v. Old National Bank*, 28 Wn.(2d) 239, 182 P.(2d) 75:

> " 'A reading of the cases hereinbefore cited will show that, under the rules announced by this court, the degree of proof required to establish a claim for services under an original contract, be it express or implied, is no different from that necessary to establish a claim for additional and different services. *However, in the latter case, where the one performing the service accepts the payments agreed to under the original contract, there is a presumption that he accepts them in full payment for all services. In both cases mentioned, the proof must be of the clearest and most convincing character*'." (Italics ours)

So, in the instant case, it would be presumed that payments made to and accepted by Schaefer were in full payment of all work performed by him.

The following Washington cases definitely support Macris' contention that where it was possible for Schaefer to keep the actual costs of the alleged extra work, so that the same would be available to him, estimates of such costs as were given, based upon hypothetical assumptions, do not constitute adequate proof of either damages or costs of work.

Blakiston v. Osgood Panel & Veneer Co., 173 Wash. 435, 23 P.(2d) 397;

Automatic Canteen Company of Washington v. Automatic Canteen Company of America, 182 Wash. 133, 140, 45 P.(2d) 41;

Hole v. Unity Petroleum Corp., 15 Wn.(2d) 416, 131 P.(2d) 150;

Jones v. Nelson, 61 Wash. 167, 169, 112 Pac. 88;

Bell v. Scranton Coal Mines Co., 59 Wash. 659, 667, 110 Pac. 628;

Lloyd v. American Can Co., 128 Wash. 298, 313, 222 Pac. 876;

Bromley v. Heffernan Engine Works, 108 Wash. 31, 182 Pac. 929.

The judgment of the trial court was based upon the theory that Schaefer was entitled to recover in *quantum meruit* for the entire performance, independent of and divorced from the contract price. Under the filed opinion Schaefer is entitled to recover

only the contract price, plus the cost or reasonable value of his extra work.

Under the above Washington cases and innumerable decisions from other jurisdictions there is no legally adequate evidence upon which to support the judgment of the trial court as a judgment for extra work plus the unpaid balance of the contract price. Two entirely different forms of proof are involved, as indicated by the repeated assertions by counsel for Schaefer to the effect that they had made no attempt and would make no attempt to segregate the extra work items from the contract performance. Contrary to the statement from the filed opinion, quoted above, that is, "* * * we cannot say that the finding of the trial court was erroneous", the trial court made no finding as to the amount of Schaefer's increased cost. Consequently there is involved no question as to the deference paid on appeal to the findings of a trial court.

There being such a large amount of money involved, particularly in view of the fact that individuals are the parties litigant, not corporations or governmental agencies, it is earnestly submitted there is no substantial proof of the use plaintiff's extra costs. This is particularly true in light of the unreasonable and exorbitant relationship between the contract price of Schaefer's performance, the amount of the judgment awarded in addition to the contract price and the amounts allowable to the cross appellants Macri under the prime contract for the performance of the items claimed by Schaefer as extra work. The very unreasonableness bespeaks the error.

Accordingly, it is respectfully submitted that the petition for rehearing herein should be granted.

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